MOTION FILED
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(3)

No. 00-1717

IN THE

Supreme Court of the United States

SHIH-HUA ALAN LEE,

Petitioner,

v.

PONANI SUKUMAR, an individual, and
SARASWATI SUKUMAR, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION OF THE CALIFORNIA APPELLATE DEFENSE COUNSEL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

California Appellate Defense Counsel ("CADC") hereby respectfully moves for leave to file the attached *amicus curiae* brief in this case. The consent of the attorneys for Petitioner Lee has been obtained. The consent of the attorneys for Respondent Saraswati Sukumar was requested but refused. The consent of the attorneys for Respondent Ponani Sukumar was also requested. Counsel for Ponani Sukumar, however, has not responded.

The interest of CADC in this case arises from its extensive involvement in criminal, juvenile, and dependency cases in California as court appointed appellate attorneys. The same issue that is before this Court, namely, the appropriate inquiry before an assertion of the Fifth Amendment privilege against self-incrimination is sustained, impacts CADC's clients and witnesses called on their behalf.

In the instant case Petitioner necessarily focuses on the broad issue of whether the Fifth Amendment privilege against self-incrimination may be invoked in a blanket manner in either civil or criminal cases. CADC believes the *amicus curiae* brief it is requesting permission to file will contain a more focused recognition of the effect blanket assertions of the privilege against self-incrimination may have in criminal cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF *CERTIORARI*

I. *AMICUS CURIAE* CALIFORNIA APPELLATE DEFENSE COUNSEL'S INTEREST IN *LEE v. SUKUMAR*

California Appellate Defense Counsel ("CADC") submits this *amicus curiae* brief in support of Lee's Petition for a Writ of *Certiorari*.[1] CADC is a non-profit organization of approximately 270 attorneys who accept court-appointed appeals in criminal, juvenile, and dependency cases. Its members accept appointments from the California Courts of Appeal and the California Supreme Court.

In this case, the Court of Appeal decided an issue of vital importance to CADC when it decided that a trial court does not need to require a witness to invoke the Fifth Amendment privilege against self-incrimination on a question by question basis. CADC has a substantial interest in this issue because it raises important constitutional issues under the Fifth and Fourteenth Amendments to the United States Constitution, which may impact CADC's clients, or witnesses called on their behalf, at trial or at other court proceedings.

II. SUMMARY OF ARGUMENT

Several Federal Circuit Courts of Appeals and state courts, including the California Court of Appeal hearing Petitioner's case, have recognized an exception to this Court's requirement that a witness must invoke the Fifth

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1. Counsel for Petitioner Lee participated substantially in authoring this *amicus curiae* brief. Additionally, Petitioner Lee financed the preparation and submission of this brief.

Amendment privilege against self-incrimination on a question by question basis. Thus, parties and witnesses receive different process solely depending on the court in which they appear. This Court should grant Petitioner's Petition for a Writ of *Certiorari* to reaffirm and clarify that when a witness asserts the privilege against self-incrimination he or she must do so on a question by question basis.

III. ARGUMENT

As attorneys dealing with criminal appeals, CADC encounters many instances in which a witness has invoked his or her privilege against self-incrimination. CADC believes such invocations are more common in criminal cases than in civil cases because witnesses are far more aware of the ramifications of criminal activity due to the environment in which they are testifying. Thus, CADC would like to emphasize the importance of the privilege to witnesses in criminal proceedings and practitioners of law who primarily work within the criminal justice system.

In this case a California Court of Appeal held it was not prejudicial error for the trial court to refuse to reopen the case to assess whether the privilege against self-incrimination applied to a witness who previously had been allowed by the trial court to make a blanket assertion of the privilege before he was even sworn in as a witness. By holding that the trial court's refusal to reopen the case was not prejudicial error, the Court of Appeal essentially held that when a court believes a witness will properly invoke the privilege as to all relevant questions, the witness is not required to invoke the privilege on a question by question basis.

This Court has recognized the importance of the privilege against self-incrimination. *See, e.g., Kastigar v. United States*, 406 U.S. 441, 444 (1972). The privilege embodies the fundamental belief of our nation that a person should not be the instrument of his or her own conviction. Further, because the privilege cannot be infringed upon by the states through the due process clause of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), the manner in which it may be invoked and applied implicates all citizens' due process rights.

This Court has consistently recognized that a witness must be sworn and assert his or her privilege as to each proffered question. *See, e.g., Rogers v. United States*, 340 U.S. 367, 374 (1951); *Mason v. United States*, 244 U.S. 362, 364-66 (1917). The Court of Appeal's decision in this case reflects a trend by some courts of carving out an exception to this general rule. *See, e.g., United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981); *People v. Cornejo*, 92 Cal. App. 3d 637, 659 (1979).

Given the conflict in the Federal Circuit Courts of Appeals and various state courts on this issue, the manner in which the witness is allowed to invoke the privilege may differ from courtroom to courtroom. One witness may only have to make a blanket statement of "I take the Fifth," while another will be required to assert the privilege on a question by question basis. The witness and the litigants, therefore, will not be able to predict what level of protection the witness's fundamental privilege against self-incrimination will receive and what testimony will be allowed or required.

This Court should grant Petitioner's Petition for a Writ of *Certiorari* because the California Court of Appeal's decision, and similar decisions around the country, effectively swallow the rule, long required by this Court,

that the privilege against self-incrimination must be asserted on a question by question basis. This Court must make clear that a court cannot properly decide whether the privilege applies without such an inquiry. If the decision of the California Court of Appeal and similar decisions around the country are allowed to stand, witnesses' right to assert their privilege against self-incrimination will receive disparate protection based solely on the jurisdiction in which they happen to be in court.

IV. CONCLUSION

CADC has a substantial interest in ensuring the uniform application and protection of the constitutional privilege against self-incrimination. The California Court of Appeal's decision in this case threatens the uniform application of the privilege against self-incrimination in a manner comporting with due process of law. Petitioner's Petition for a Writ of *Certiorari* should be granted to reaffirm and clarify that the privilege against self-incrimination must be asserted and evaluated on a question by question basis.

Respectfully submitted,

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